REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC CAUSE NO. 358 OF 2017

FORMERLY KISII NO. 118 OF 2013

DAVID KIPRORO OLE PEREGWE.....PLAINTIFF

-VERSUS-

SAMSON SOYA OLE SOYA & OTHERS.....DEFENDANTS

RULING

By a Notice of Motion dated 20th December, 2018 and brought under order 9 Rule 5,9,22 and Rule 25 of the Civil Procedure Rules for the Applicant sought for the following orders: -

1. Spent

2. That stay of execution of the decree in respect of the ruling delivered on the 1st day of October, 2018, be issued pending hearing and determination of this Application.

3. That leave be granted to the firm of Ms Leina Morintat & Company advocates to come on record as advocates for David Kiprono Ole Peregwe, the Plaintiff/Applicant herein, after ruling in place of Ms Obure & Company Advocates

4. That stay of execution of the decree in respect of the ruling delivered on the 1st day of October, 2018, be issued pending the hearing and determination of this application.

5. That the decree/ruling delivered on 1st October, 2018 be set aside and order for the suit herein be reinstated.

6. That cost of this application be provided for.

The Application was based on the grounds that the Plaintiff's former Advocates did not inform him about the suit hearing dates and that the Applicant should not be punished for the mistakes of his advocates. That the instant application was made without inordinate delay and it shall serve the interest of justice if the instant Application is allowed. The Application was further supported by the Affidavit of the Applicant in which he reiterated that he trusted his previous advocates to exercise due diligence and inform him of the hearing of his case but the advocates kept him in the dark and it was after he instructed the current advocate that he found the suit was dismissed with costs and were it not for the actions of the advocate his case would not have been dismissed.

The Applicant further contends that it shall serve the interest of justice if there is stay of execution since he has an arguable case and have the suit heard and determined on merit.

The Application was opposed by the Response filed by the 3rd Defendant/Respondent with the authority of his co-defendants/respondents. The respondents averred that the suit was filed in 2013 and the Applicant for a period of 7 years neglected and refused to have suit prosecuted and further that there was lack of seriousness on the part of the Plaintiff that the court had directed the parties to attend court on 5th March, 2018 in which the Plaintiff and his advocates failed to attend. The Respondent further contends that it was the Respondents advocates who took trouble to have the suit severally fixed for hearing and carried out service of hearing notices to be made but they neglected to attend court and have the suit heard and determined.

The Respondent had urged that its time that parties and advocates are made to take responsibility for their actions especially where a party delays the hearing of suit filed by them.

I have read the Application before me and the submissions made by the parties. This is an application in which the Applicant is seeking for

the reinstatement of his suit after it was dismissed. It is the Applicant's contention that the suit was dismissed entirely because his advocate on record then did not inform him about the hearing of the suit and the progress made on the case. He requests the court not to punish him for the mistakes of his advocates as he will suffer irreparably if execution is levied against him.

The Respondents in their submissions contend that the Applicant should be entitled to the orders sought as it has been 7 years since the suit was filed and because no reasonable steps were taken by the Plaintiff they should not expect any sympathy from the court.

Having considered the Application carefully, the Reply in opposition thereto and the submissions made on behalf of the parties there is no dispute that the suit herein was filed in 2013 and that no action was taken by the Plaintiff as per the record of the court to have the suit herein prosecuted. Infact from the record it is clear that it was the Defendants counsel who had taken out 5 (five) Hearing Notices and 2 (two) Mention Notices issued by the Deputy Registrar of this court which Notices were validly served and Affidavits of Service thereto filed but the Plaintiff and his counsel for unknown reasons elected to abandon the suit they filed in court. The instant Application is one which the Applicant is seeking a discretionary order of reinstatement of his suit after he took no steps to have the suit set down for hearing and determination and the court to set aside the order dismissing the suit for want of prosecution.

This court has unfetifered discretion to set aside an exparte order and set aside the same if a party can show that the same will cause him irreparable loss and damage.

In the case of **CMC HOLDINGS -VERSUS- NZIOKI (2004)1 KLR 173** the court held:

> **"in law, the discretion that a court of law has, in deciding whether or not to set aside exparte order……..was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things excusable mistakes or error….it would not be proper use of such a discretion if the court turns its back on such a litigant……"**

From the foregoing I have perused the pleadings and the court record to find out if there is such an excuse or error that is worthy of this court to exercise its discretion. The Applicant contends that the suit was dismissed as a result of the negligence of his advocate who never told him about the hearing of the case. However, taking into account that the suit herein was filed in 2013 and the applicant or his advocate for 7 years did not ask why the case was taking long is not only negligical but desertion of his duty. Advocates often have no proprietary interest in suits they handle for their clients even though a duty is placed on the advocates to be diligent often the same duty is vested on the party instructing to know the fate of his case. It won't have costed the Applicant to walk to the court registry and find out the status of his case and in the circumstances I find that it is not an inexcusable mistake.

In the case of **BAINS CONSTRUCTION COMPANY LTD -VERSUS- JOHN MZARE OGOWE (2011)eKLR** the court observed:-

> **"it is to some extend true to say mistakes of counsel as in the present case should not be visited upon a party but it is equally true when counsel as an agent is vested with authority to perform some duties and does not perform it, surely such principals should bear the consequences".**

From the above where counsel has failed to partake his duty and the applicant being the principal has failed to supervise the performance of such duty then he should bear the consequences.

In view of the above it is evidently clear that both the advocate the Applicant were indolent in the execution of their duties and I find the same as inexcusable conduct moreso when over 6 notices were issued and they failed to honour them and only come to court after seeing the results and consequences of their indolence and I am therefore not persuaded to exercise my discretion and rule in favour of the applicant and therefore I find that the Application lacks merit and I dismiss the same with costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAROK ON THIS 14TH DAY OF NOVEMBER, 2019

Mohammed Kullow

Judge

14/11/19

In the presence of: -

CA:Chuma/Kimiriny

Mr Kibet holding brief for O.M. Otieno for the Defendant/Respondent

N/A for the Applicant

Mohammed Kullow

Judge

14/11/19